KOK KON SANG

v.

SITI ZALIHA BTE MD. NOOR & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[SUIT NO. S4-21-39-91 & S4-22-351-91]
30 JULY 1992

CONTRACT: Sale and purchase agreement - Application for specific performance - Application for summary judgment - Order 81 r. 2, Rules of the High Court.

LAND LAW: Private caveat - Application to remove - Section 327, National Land Code - Whether respondent had caveatable interest - Sale and purchase agreement - Whether validly terminated - Whether valid notice to terminate given; refusal of the State Authority to consent to the agreement on application by defendant - Effect on the agreement - Subsequent consent on application by plaintiff - Effect under the agreement and under s. 124(1) of the National Land Code.

PRACTICE AND PROCEDURE: Application to remove caveat - Application rejected - Application for hearing of further arguments in open court - Order 56 r. 2, Rules of the High Court - Appeal to Supreme Court against rejection of application already dismissed - Whether application for hearing in open court could be proceeded with - Whether principle of res judicata applicable - Neither judgment of Supreme Court nor record of proceeding produced - Effect of - Application for summary judgment pursuant to O. 81, Rules of the High Court - Effect of.

The respondent/plaintiff and the applicant/defendant, the registered proprietor of a piece of property, entered into a sale and purchase agreement. The terms and conditions provided, *inter alia*, that the applicant/defendant shall apply to the relevant authority for consent to the transfer of the property, and the respondent/plaintiff was to settle the balance of the purchase price by a stipulated date, and in the event of the respondent/plaintiff failing to pay the balance by that dated, there was to be an extension of one month, with interest payable, after which the agreement was to become null and void if payment was still not forthcoming, and the deposit to be forfeited. An application was made to the State for consent of the transfer, but it was rejected. The respondent/plaintiff then applied on her own and obtained the consent. The respondent/plaintiff failed to make the final payment in time. Notice by letter was given to the respondent/plaintiff, terminating the agreement.

As the respondent/plaintiff had entered a private caveat against the land, the applicant/defendant applied under s. 327, National Land Code, for removal of the caveat, praying for loss of rental and damages. The application was dismissed. The applicant/defendant applied for hearing of further arguments in open court. At the same time, the applicant/defendant appealed to the Supreme Court against the dismissal of the application. His appeal was dismissed.

The respondent/plaintiff filed a writ of summons, simultaneously applying for specific performance pursuant to O. 81, Rules of High Court.

Held:

[1] Application for hearing in open court could be proceeded with even though the appeal against the earlier rejection had already been dismissed.

(i) The principle of res judicata was not applicable, as neither the Supreme Court judgment not the record of the proceeding had been produced, and there was nothing to indicate that the issues in dispute in the present case had been considered and determined by that court.

(ii) As the plaintiff had by the time of hearing applied for summary judgment pursuant to O. 81 for specific performance of the sale and purchase agreement, the question of the right to caveat the property could not be ignored.

[2] The application for the removal of the caveat should be allowed, and the application for summary judgment should be dismissed.

(i) The sale and purchase agreement had been validly terminated under the terms of the contract. The rule of construction applicable in the interpretation of the agreement was the literal rule of construction, as there was no ambiguity in the relevant clause of the agreement.

(ii) The agreement had been nullified by the refusal of the State Authority to give their consent. The subsequent consent did not revive it. In fact, by unilaterally appealing to the State Authority against the refusal, the plaintiff had acted in breach of an

essential term of the agreement, that the consent should be obtained by the defendant, and also in violation of s. 124(1) of the National Code, which provides that it is the proprietor of any aliented land who can apply for recission or amendment of any express condition endorsed on the title.

[Application to set aside caveat allowed with costs. Application for summary judgment pursuant to O. 81 dismissed with costs.]

Cases referred to:
American Cyanamid v. Ethicon Ltd. [1975] AC 396 (refd)
Annie Johnson 91 LJP 64 (refd)
Dalsukh v. Guarantee Life & Employment Insurance Co. AIR 1947 PC 182 (refd)
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 214 (refd)
Foo Loke Ying & Anor. v. Television Broadcasts Ltd. & Ors. [1975] 2 MLJ 35 @ 39 (refd) (foll)

Legislation referred to:
National Land Code 1965, s. 124(1)
Rules of the High Court 1980, O. 56 r. 2, O. 81

For the respondent / plaintiff - Zulkifli bin Che Yong; M/s. Khamshah & Partners
For the applicant / defendant - C.H. Yeap; M/s. C.H. Yeap & Maluda

JUDGMENT

Lim Beng Choon J:
By Originating Motion No. S4-21-39-91 filed on 19 March 1991, Kok Kon Sang applied to set aside a private caveat registered as Perserahan No. 111/90 Jilid 49 Folio 191 on 15 January 1990 (hereinafter referred to as "the private caveat") by Siti Zaliha bte Md. Nor over a parcel of land held under HS(M)3203 Lot 8867 Mukim Ampang Daerah Ulu Langat Selangor (hereinafter referred to as "the disputed property"). Kok Kon Sang also prayed for

(i) loss of rental and
(ii) damages.

The application was incorrectly heard as chambers matter on 26 April 1991 when I dismissed the application. On the same day Kok Kon Sang wrote in to request for hearing of further arguments in open court. As the matter should be heard in open court where the Counsel for the respective parties would be able to argue his client's case fully, I therefore allowed the application to hear further arguments pursuant to O. 56 r. 2 of the Rules of High Court 1980 (RHC). I should also mention that before I had decided to allow Kok Kon Sang's application made under O. 56 r. 2, he had apparently filed an appeal to the Supreme Court against my decision disallowing his application to remove the private caveat. At the material time I was not aware of the said appeal. Upon receipt of my approval to hear further arguments, he did write to this court on 28 May 1991 with a copy to the Pendaftar Mahkamah Agung, indicating his intention to withdraw his appeal to the supreme court pending the hearing of further arguments by me. He also requested that the RM500 deposited be refunded to him. The Penolong Kanan Pendaftar Mahkamah Agung replied to him on 9 October 1991 stating that as the Supreme Court had on 19 August 1991 dismissed the appeal with costs the deposit of RM500 would be retained pending assessment of costs to be paid to the respondent. I mention the appeal to the Supreme Court as Counsel for Siti Zaliha bte Mohd. Nor, raised a preliminary point of law that this court should not proceed with the hearing of further arguments on the ground that as his appeal to the Supreme Court had been dismissed the principle of res judicata would apply. I must mention that learned Counsel did not seriously pursue the matter. In any event I rejected learned Counsel's contention simply because I had been advised that Kok Kon Sang was 10 minutes late in attending at the hearing of his appeal before the Supreme Court and apparently his appeal was dismissed on the ground of his non-appearance at the trial of his appeal (see Kok Kon Sang's letter of 11 March 1992). In any event Counsel did not produce the judgment of the Supreme Court; neither did he produce the record of the proceeding. Failure to do so is fatal to his reliance on the res judicata principle (see the *Annie Johnson* 91 LJP 64) since there is nothing to indicate that the issues in dispute in the present case had indeed been considered and determined by the Supreme Court. Relating to the dismissal of the appeal by the Supreme Court, there is yet another factor which I should consider though Counsel for the parties did not raise this point. It relates to the right of Kok Kon Sang to pursue further with his application to set aside the interim injunction when the Supreme Court had dismissed his appeal against my earlier decision to disallow his application. By the dismissal it could be said that his application had been

brought to an end. Strictly speaking therefore Kok Kon Sang could not re-litigate the application before this court. Be that as it may I allowed Kok Kon Sang to raise the issue contained in his application at the hearing of the court held on 20 January 1992 because firstly the plaintiff had by then filed an application by way of summons-in-chambers for summary judgment pursuant to O. 81 for specific performance of the relevant sale and purchase agreement (the details of which would be set out presently). That being the case the question of the plaintiff's entitlement for specific performance would also inevitably involve her right to caveat the said property. Kok Kon Sang would likewise inevitably contest and submit that the plaintiff had no such rights. The question of the right to caveat the said property could not be ignored - it must be answered. Secondly in dismissing the appeal, for the reason as stated above, it is more probable than not that the Supreme Court had not considered the merits of the appeal. Hence for these two reasons I allowed Kok Kon Sang to raise further arguments to support his application.

Before the application of Kok Kon Sang for further arguments could be heard, Siti Zaliha bte Md. Nor filed a Writ with a statement of claim on 5 August 1991 registered as C.S.22-351-91. In her statement of claim Siti Zaliha bte Md. Nor (the plaintiff) prayed *inter alia* for:

(a) an order directing Kok Kon Sang (the defendant) to obtain within 21 days an undertaking from Standard Chartered Bank to whom the disputed property was charged to release the original title of the disputed property and a certificate to certify the discharge of the said charge.

(b) an order directing the defendant to execute a proper Memorandum of Transfer of the said property to the plaintiff within 21 days after payment of the full purchase price by the plaintiff.

(c) an order directing the defendant if necessary to take steps to get the approval or consent of the appropriate authority regarding the transfer of the disputed property to the plaintiff and

(d) an order directing the defendant to pay damages.

In the course of writing this judgment I took note of the fact that Kok Kon Sang the defendant in the suit, is described as "Kok Kon Seng". Apparently the defendant is also known by the name specified in the Writ since in his Memorandum of Appearance filed on 5 September 1991 (enclosure 6) he implicitly acknowledged that he is also known as Kok Kon Seng. Simultaneously with the filing of the Writ the plaintiff also filed a summons-in-chambers pursuant to O. 81 of the RHC praying for specific performance of the sale and purchase agreement dated 13 March 1989.

On 9 October 1991 the defendant filed his statement of defence and also a Counterclaim in which he asked *inter alia* for:

(a) a declaration that the sale and purchase agreement of 13 March 1989 had been properly terminated and it was no longer effective and that the deposit paid be forfeited in accordance with clause 8 of the said agreement;

(b) that an order be granted for vacant possession of the disputed property;

(c) that the plaintiff should pay compensation for the loss of use and rental occasioned by the plaintiff's unlawful occupation of the said property upon termination of the agreement.

As the subject matter in dispute between the two parties in the action commenced by the aforesaid originating motion and the writ summons involved basically on one main issue namely whether or not the sale and purchase agreement of 13 March 1989 had been validly terminated, I agreed to hear further arguments in respect of the applicant/defendant's application and also the application of the plaintiff for specific performance at the same time. Counsel for the respective parties were directed to file in their respective submissions which they did.

It is appropriate at this stage to set out the facts that are not in dispute and they are as follows:

The plaintiff and the defendant entered into a sale and purchase agreement on 13 March 1989 (the agreement) in which the defendant was described as the registered proprietor of the disputed property together with a double storey terrace house built thereon known as No. 28, Jalan Nirwana, Off Kampong Pandan, 55100 Kuala Lumpur and also as vendor of the disputed property. For convenience, I shall continue to use the term "disputed property"

to include the said double storey house erected on the land held under H.S. (M) 3203 Lot 8867 Mukim Ampang Daerah Ulu Langat Selangor. It was mentioned in the recital that the disputed property was charged to Standard Chartered Bank Berhad Petaling Jaya (the Vendor's Bank) as security for a loan granted to the vendor. It was also mentioned in the recital that the defendant confirmed the receipt of a sum of RM1000 prior to the execution of the agreement. By the agreement the defendant agreed to sell and the plaintiff to purchase the disputed property at the purchase price of RM94,000 with vacant possession and free from all encumbrances subject to the terms and conditions set out in the agreement. I do not propose to set out the terms and conditions of the agreement as I shall be citing some of the more relevant terms and conditions later in the judgment. Suffice it to state that after executing the agreement the plaintiff made the following payments the receipts of which were duly acknowledged by the defendant:

(1) payment by cheque delivered to the defendant on 14 March 1989 to the account of the Vendor's Bank in the sum of RM8,400 being deposit and part payment towards the purchase price in accordance with clause 2 of the agreement; and

(2) payment by cheque delivered to the defendant on 4 April 1989 to the account of the Vendor's Bank in the sum of RM18,800 as further part-payment of the purchase price in accordance to Clause 3 of the agreement. Upon making this payment the plaintiff was allowed to take delivery of vacant possession of the disputed property as provided in the said clause 3 read with clause 12 of the agreement.

It was also provided in clause 4 of the agreement that the "purchaser is applying for a housing loan to enable her to complete the purchase of the said property." The plaintiff duly applied for a housing loan in the sum of RM60,000 to Malayan Banking Berhad (the Purchaser's Bank) which was duly approved on 4 April 1989 subject to terms stipulated therein (see exhibit 'SZMN-1' annexed to enclosure 5 of O.M. 24-21-39-91). Two of the important terms, of the agreement provided that the release of the loan would be made upon confirmation that:

(i) there in no restriction endorsed on the title deed against the charging of the property to the Purchaser's Bank;

(ii) before the execution of the said charge a Memorandum of Transfer in respect of the said property had been duly executed by the transferor (meaning the defendant as vendor) and the chargor (meaning the plaintiff as purchaser).

On the same date that is, 4 April 1989, the Purchaser's Bank also wrote to M/s Khamshah & Partners, the solicitors acting for the plaintiff requesting them to prepare the 1st legal charge on the disputed property. Pursuant to clause 6 of the agreement which provided that "Upon execution of this agreement the vendor shall apply to the relevant Authority for consent to transfer the said property to the purchaser," the necessary application for the required consent was jointly made by the plaintiff and the defendant on 28 March 1989 to the Selangor State Authority but it was rejected on 30 August 1989. Thereafter the plaintiff on her own motion lodged an appeal with Pegawai Daerah Ulu Langat on 21 September 1989. Apparently the appeal was referred to the Selangor State Authority who subsequently on 11 July 1990 gave their consent for the transfer of the disputed property. The letter of approval was addressed to the solicitors of the plaintiff who received it on 26 July 1990 with a copy sent to the plaintiff herself but no copy of the said letter was sent to the defendant.

Adverting to the case for the plaintiff, one can gather from her pleadings and her affidavit in support (enclosure 2) of her application for specific performance that her main contentions to sustain her case may be summarised as follows:

(a) Notwithstanding that the plaintiff had successfully obtained a housing loan from the plaintiff's bank as early as 4 April 1989 to pay the balance sum of the purchase price of RM65,800, the defendant on the other hand had failed to secure a written undertaking from the defendant's bank to deliver the original title deed of the disputed property, a certificate certifying a release of the charge on the disputed property and other relevant documents to the plaintiff's solicitors. The plaintiff had on 16 June 1989 and 8 July 1989 through her solicitors written to the defendant's solicitors and the defendant's bank for the delivery of the aforementioned documents but without success.

(b) Due to the failure on the part of the defendant and/or the defendant's bank to do the needful, the plaintiff was consequently pre-

vented from paying the balance sum of the purchase price within the stipulated period as set out in the agreement.

(c) Furthermore under clause 9 of the agreement, the defendant was obliged to apply to the relevant State Authority to get their approval for the transfer of the disputed property to the plaintiff. Instead the plaintiff on her own initiative had to make appeal after appeal to the relevant state authority before they finally gave their approval on 11 July 1990 (see paragraphs 11 and 12 of the plaintiff's affidavit enclosure 2).

(d) In any case the delay in obtaining the approval from the relevant state authority is no justification for the defendant and/ or the defendant's bank in failing to release the aforementioned documents to the plaintiff's solicitors.

(e) Moreover when the state authority refused to approve the transfer of the disputed property as stated by the defendant, then the defendant should refund all payments made by the plaintiff pursuant to clause 10 of the agreement which the defendant failed to do so.

(f) The plaintiff had taken the initiative to pay the redemption sum to the Defendant's Bank to discharge the charge.

(g) The plaintiff had spent RM11,500 to carry out renovations to the disputed property.

The contentions of the defendant in his affidavit opposing the plaintiff's thus:

(i) It was admitted that the parties entered into the sale and purchase agreement of 13 March 1989.

(ii) The agreement was terminated for one of the following reasons:

(a) the plaintiff had failed, neglected and refused to settle the balance of the purchase price amounting to RM65,000 (RM65,800(?)) despite repeated reminders from the defendant's lawyers.

(b) the relevant authority had rejected the joint application made by the defendant and the plaintiff for consent to transfer the disputed property despite further appeal to higher authority, namely the Menteri Besar of Selangor.

(iii) The defendant claimed that he had no knowledge of the loan given to the plaintiff by her bank; neither did he know of what transpired between the plaintiff and her bank.

(iv) The defendant also denied that the plaintiff and/or her bank had ever made a request to obtain an undertaking from the defendant's bank. In any event the defendant's bank had given an unconditional undertaking at the request of the plaintiff's solicitors but the plaintiff did not take any step to pay the balance sum of RM65,800 to the defendant's bank or to his lawyers.

(v) As the plaintiff failed to pay the balance sum on or before the stipulated date in clause 5 of the agreement, the defendant through his solicitors had given a 1-month extension to enable the plaintiff to pay the balance sum subject to the payment of interest at RM438.60 p.m. as provided in clause 8 of the agreement. As the plaintiff through her solicitors had rejected the offer the agreement therefore expired on 13 June 1989. Subsequently the defendant sent a letter dated 10 September 1989 informing the plaintiff of the termination of the agreement and the forfeiting of the deposit paid by her and also requesting for delivery of vacant possession of the house to the defendant.

(vi) The defendant asserted that he could not extend the validity period of the agreement indefinitely because of his commitment to his Bank to whom the disputed property was charged.

(viii) As regards to the plaintiff's appeal to the state authority, the defendant contended *inter alia* that under the National Land Code there was no provision for the plaintiff as purchaser of the disputed property to make arbitrary appeal for consent from the State Authority without the concurrence of the registered proprietor especially when the agreement had already expired, lapsed and terminated by the defendant. In any event the defendant contended that the purported letter of consent sent by the State Authority was void and the plaintiff herself had expressly admitted so under paragraph 8(c) of her statement of claim.

(viii) As the plaintiff had made no attempt to carry out her obligation to pay the balance sum the defendant had concluded the sale of the disputed property to a third party on 20 September 1991.

I shall first deal with the application of Kok Kon Seng to set aside the private caveat. For case of reference I should state that while in dealing with the application of Siti Zaliha bte Md. Nor for summary judgment pursuant to O. 81 of the RHC in the present civil suit I have

referred to and will continue to refer to the parties thereto as plaintiff and defendant. However in dealing with the application to set aside the private caveat I shall refer to the parties thereto as applicant and respondent. Another matter which I should mention at the outset is that although both the applicant and respondent had filed in their respective affidavits in support of or in opposition to, as the case may be, the application, I do not propose to set out all the averments contained in the affidavits as I shall be referring to some of the more relevant averments in this judgment. Furthermore the more important contentions of the respective parties in the present application are substantially the same as their respective contentions raised in the plaintiff's application for summary judgment which I have summarised earlier.

Turning to the law, it is obvious that the relevant authority from which guidance can be sought when one is dealing with an application to set aside a private caveat is the leading case of *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 214. In that case Lord Diplock firstly observed that where a caveator is not the registered proprietor of the caveated land - typically a purchaser to whom the registered proprietor has contracted to sell the land but the sale has not yet been completed by a proper instrument of transfer duly registered, as in the present case before me, - it is for the caveator to satisfy the court that there are sufficient grounds in fact and law for continuing in force the caveat which prevents the registered proprietor from exercising his unfettered right to deal with the land as he pleases. Unlike the registered proprietor such a caveator has no registered title to rely on as *prima facie* evidence of his interest in the land. Lord Diplock then went on to explain the nature of onus that lies upon the caveator to satisfy the court that he has sufficient grounds to sustain the continuation of the caveat. What the caveator must do is that he must first satisfy the court that on the evidence presented to it his claim, to an interest in the property does raise a serious question to be tried. He is not required to satisfy the court that there is a "probability," a "*prima facie* case" or a "strong *prima facie* case" that if the action goes to trial he will succeed. In other words so long as he can satisfy the court that there is a serious question to be tried the caveat lodged by him should remain to maintain the *status quo* until the trial of his action thereby preventing the caveatee from disposing of his land to some third party. Another useful observation made by His Lordship is that the concept of balance of convenience which is applicable to the grant or the setting aside of an interim injunction, as the case may, be as exemplified in *American Cyanamid v. Ethicon Ltd.* [1975] AC 396 is equally applicable to the determination of an application to set aside a caveat. Finally His Lordship gave a useful exposition regarding the approach to be adopted by a judge in attempting to resolve conflicts of evidence on affidavit. He said:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth.

Bearing in mind the legal principles adumberated above, I shall now revert to the contentions raised in the present case. Although Counsel for the respective parties have not in their submissions raised the issue of the *locus standi* of the respondent to caveat the disputed property nevertheless the applicant in one of his affidavits seemed to suggest that as the respondent had failed to pay the final balance price of RM65,800 she had no right or interest in the disputed property and hence she had no right to caveat the same. The short answer to this suggestion is that the respondent is the purchaser to whom the defendant as registered proprietor has contracted to sell the disputed property hence she has an interest in the same and is entitled to lodge the caveat pending the completion of the sale when the proper instrument of transfer could then be registered. I shall now revert to the first contention of the applicant *viz* that the agreement

had been properly terminated by letter dated 10 September 1989. In my considering this contention the following facts, as can be culled from the affidavits filed by both parties in the application for summary judgment made by the respondent in her capacity as plaintiff in the civil suit and in the application of the applicant to set aside the private caveat by way of originating motion are to be noted:

(1) there is not a shred of evidence to show that the respondent had at any time tendered the final balance of the purchase price of RM65,800 to the applicant or his solicitors in compliance with her contractual obligation to pay the same. Indeed up to today no such tender has been made.

(2) in response to the applicant's several letters demanding her to quit and to deliver vacant possession her response was simply that she was ready or able and willing to pay the balance sum.

(3) the written undertaking from the vendor's bank as mentioned in clause 5 of the agreement was duly delivered to the respondent's solicitors on 17 July 1989.

(4) the joint application of applicant and the respondent to obtain the Selangor State Authority's consent to transfer the disputed property was rejected by the said authority in the letter dated 30 August 1989.

(5) there were at least three letters dated 10th September 1989, 29th November 1990 and 26th December 1990 demanding the respondent to quit and to deliver vacant possession of the disputed property.

Now the power to terminate the agreement is conferred by clause 8 of the agreement which reads:

> In the event of the purchaser failing to pay the said final balance sum of the purchase price as referred to in clause 5 above within the stipulated period the vendor .shall extend the time for such payment for another one (1) month from the date of expiry of the completion date and there shall be interest chargeable on the Purchaser on the balance sum of RM65,800 or a lesser sum for the extended one (1) month at the rate of 8% per annum on daily rests and thereafter the sum of RM9,400 so paid under clause 2 above shall be irrevocably forfeited by the vendor as agreed compensation and this agreement shall be null and void and of no further effect.

The divergent contentions of the parties in disputing the validity of the termination of the agreement calls for a proper construction by this court of the provisions of this clause 8. In doing so I must bear in mind that the first cardinal rule of interpretation is that it is to be assumed that the words and phrases as used in the contract are used in their ordinary meaning and another equally important rule is that phrases and sentences are to be construed according to the rules of grammar. These two rules read together have been referred to as the literal rule (see *Foo Loke Ying & Anor. v. Televison Broadcasts Ltd & Ors.* [1975] 2 MLJ 35 @ 39.

Applying the abovementioned rules of construction, I cannot see any ambiguity in clause 8. It is plain that clause 8 is capable of only one construction: if the purchaser (the respondent) failed to pay the final balance of the purchase price within the 2-month stipulated period as provided in clause 5 the vendor (the applicant) should give an extension of one month to enable the respondent to pay and the defandant is entitled to impose interest on the balance sum for the extended one month at the rate of 8% per annum on daily rests and thereafter the sum of RM9400 so paid under clause 2 of the agreement shall be irrevocably forfeited by the applicant and the agreement shall be null and void and of no further effect. It is to be noted that there is no Provision in clause 8 requiring the applicant to give any notice to terminate the agreement - it automatically comes to an end should the respondent fail to comply with the payment of the final balance of the purchase price on or before the 3-month prescribed and thereafter the applicant is entitled to forfeit the deposit sum of RM9400 and the agreement would cease to have any legal effect. Now it has been contended by the respondent that the letter of termination sent by the applicant on 10 September 1989 is defective for two reasons *viz*

(i) the applicant had no right to charge interest as from 14 June 1989 since on that date the required letter of undertaking from the vendor's bank had not yet been issued to the respondent's solicitors and

(ii) the letter of termination was sent by ordinary post and not by registered post as required by clause 14 of the agreement.

I do not agree simply because even if the applicant had no right to charge interest as from 14 June 1989 since the letter of undertak-

ing as stipulated in clause 5 of the agreement had not yet been issued by the vendor's bank nevertheless the termination is valid as the required letter of undertaking had been issued by the vendor's bank on 17 July 1989 nearly 2 months prior to the termination. Moreover as I have said earlier the applicant is not bound to give a formal notice of termination pursuant to clause 8. All he needs to do at the material time was to point out to the respondent that the agreement ceased to be effective as she had failed to pay the final balance purchase price for nearly four months from the date of expiry of the 2-month period that is from 13 May 1989. Even assuming I am wrong (to which I cannot accede) there is still the other letter written by the solicitors for the applicant dated 29 November 1990 by which the respondent was asked to quit as she was occupying the disputed property as a trespasser and to deliver vacant possession of the disputed property. The response of the respondent to this letter of the applicant's solicitors is significant in that by her reply through her solicitors dated 24 December 1990:

(i) she did not dispute the allegation of the applicant that she was in occupation of the disputed property as a trespasser;

(ii) indeed in stating that as she was **still interested** in purchasing the disputed property and that all relevant documents of the disputed property would be completed upon the purchase price being released, by her bank, it is plain to me that prior to her receipt of the letter dated 11 July 1990 by which the Selangor State Authority consented to the transfer of the disputed property she was no longer interested in the sale and purchase transaction of the disputed property. For this reason the respondent persistently refused to tender the sum of RM64,800 being the final balance of the purchase price notwithstanding that the applicant had carried out his obligations of causing the required letter of undertaking to be issued and granting an extension of one month to enable the respondent to pay.

(iii) the above proposition concerning her losing interest in the purchase of the disputed property and her refusal to pay the balance of the purchase price is reinforced by her solicitors' letter of 15 November 1989 in which she *inter alia* sent back by cheque the loan sum of RM60,000 to Malayan Banking Berhad, her financing Bank on the ground that the Selangor State Authority had refused to give consent. Bearing in mind that on 21 September 1989 just three weeks after the Selangor State Authority had refused to give consent, the respondent had deemed it fit to lodge an appeal, yet she chose not to make any payment and instead returned the loan sum to her financing bank. If she was sincere in pursuing the sale and purchase transaction it is inherently incredible that she would keep on resisting the applicant's demand for payment. The only logical conclusion that one could arrive at in the light of the evidence is that the respondent was prepared only to pay the necessary deposits to get vacant possession of the disputed property and thereafter she was reluctant to settle the balance of the purchase price of RM64,800 until she had some assurance that the necessary consent from the appropriate authority would be forthcoming. Her action or rather her inaction tantamounts to a breach of her contractual obligation to pay the balance purchase price.

(iv) the respondent by her solicitors letter of 14 December 1990 also asked for time to pay as she had to make arrangement with her bank regarding her loan. By then the respondent had delayed payment for nearly 15 months. One may well ask how much longer should the defendant wait for the money to which he was entitled under the agreement?

From the above discussions it is clear to me that the respondent was in breach of clause 5 of the agreement in failing to pay the balance of the purchase price and pursuant to clause 8 thereto the applicant has the right to treat the agreement as null and void and to forfeit the sum of RM9400. It may well be argued that as the applicant had failed to secure the letter of undertaking from his bank pursuant to clause 5 within the 2-month period stipulated therein and the 1-month extension granted pursuant to clause 8, time could no longer be the essence of the payment clause-time was left at large. That may well be true but it certainly cannot be said that the respondent could delay payment for an indefinite period notwithstanding that the said letter of undertaking had been issued to her solicitors on 17 July 1989. She must therefore pay the balance of the purchase price within reasonable time. Again it may be argued that since the applicant insisted on claiming interest as well as the balance of the purchase price, the respondent was no longer bound to pay. Such argument is best said and rejected. The respondent could simply ignore the applicant's demand for interest and proceed to pay the balance purchase price to

perform her part of the bargain. If the applicant chose to reject her payment she could not be blamed for not carrying out her obligation. In the present case the respondent simply chose not to pay at all.

Turning to the second contention of the applicant namely that in any event the agreement had been nullified by the refusal of the Selangor State Authority to give their consent, I am in full agreement with this proposition. The Privy Council case of *Dalsukh v. Guarantee Life & Employment Insurance Co.* AIR 1947 PC 182 lends support to the said proposition. In the Privy Council case the defendant contracted to sell certain property to the plaintiff. One of the terms of the contract was that the property was to be sold subject to the court's approval. An application was duly made to the court but was rejected. Thereafter the plaintiff sued the defendant for specific performance of the agreement. In confirming that dismissal of the plaintiff's suit was correct Sir Madhavan Nair said at p.186:

> ... application was made by the vendor to the proper court and was refused; the contract then fell to the ground and had worked itself out. In their Lordships' opinion, the contract was a contingent contract and, as the contingency failed, there was no contract which could be made the basis for a decree for specific performance and the appellant's suit has to be dismissed.

In the present case clause 6 of the agreement casts the obligation on the vendor (that is the applicant) to apply to "the relevant authority" for consent to transfer the disputed property to the Purchaser. This is necessary since the title of the disputed property is endorsed with the following condition:

> Tanah Yang dipajakkan ini tidak boleh dipindah milik atau dipajakkan melainkan dengan kebenaran Pihak Berkuasa Negeri.

As stated earlier the respondent took it upon herself to appeal to the Selangor State Authority to review their decision to refuse consent. The appeal was lodged by the respondent on 21 September 1989. The applicant was completely in the dark as regards to this appeal since a copy of the appeal was not extended to him neither was he notified of the appeal. In lodging the appeal behind the back of the applicant I hold that the respondent was in breach of clause 6 since that clause casts the obligation on the vendor to apply for the necessary consent. The purchaser has no right to unilaterally lodge an appeal - she should at the very least inform the vendor before lodging the appeal to obtain his concurrence. In considering this issue the following observation of Sir Madhavan Nair made in the *Dalsukh's* case (*supra)* is relevant (see p. l86):

> The question next to be considered is whether the appellant could waive the benefit of the condition and call upon the vendor to perform the contract in spite of the failure of the condition? Their Lordships have already pointed out that the term in question was an essential one intended not exclusively for the benefit of the purchaser, and that it was for the benefit of the vendors also. It follows therefore that the purchaser cannot get rid of the necessity for the approval of the court by his waiver.

Likewise in the present case clause 6 is an essential term intended not exclusively for the benefit of the purchaser and that it was for the benefit of the vendor as well. I say so because while the purchaser surely would not be keen to purchase a property subject to such a condition likewise the vendor would be equally anxious to have the condition removed or varied to enable him to carry out his contractual obligation to transfer the disputed property to the purchaser free from all encumbrances. Even if the word "encumbrances" does not include express condition imposed by the State Authority nevertheless it is still in the interest of the vendor to have the condition revoked or varied otherwise he would not be able to sell the disputed property to the purchaser at the agreed purchase price. That being the case the purchaser has no right to expect or presume that the vendor should suspend the rejection order and take no action pending her appeal to State Authority. For that matter neither could the vendor himself suspend the rejection order pending his appeal if the purchaser would not concur. Quite apart from this, it is to be noted that under s. 124(1) of the National Land Code 1965 (NLC) it is provided that the proprietor of any alienated land may apply to the State Authority under that section for the recession or amendment of any express condition endorsed on the title. It is therefore clear that a person not being the proprietor cannot make any application to rescind or amend a express condition even though he may have an interest

in the land. Such a person should however be informed of any application made by the proprietor to enable him to concur or object to the application. It follows therefore the respondent is not only in breach of clause 6 of the agreement she had in fact acted in violation of a statutory provision. As the respondent is in breach of an essential term of the agreement which will render the agreement nugatory pursuant to clause 10 of the agreement and acted in violation of s. 124(1) of the NLC she has no right to ask for specific performance of the agreement. The most that one can say in favour of the respondent is that she may be entitled to damages provided that she is able to discharge the onus of proof.

For the above reasons I hold that the interim injunction must be set aside. The respondent has not only failed to raise any serious question to be tried she does not even have a reasonable cause of action as the agreement has properly been terminated by the applicant if not by the letter of termination dated 10 September 1989 at least by his solicitor's letter dated 29 November 1990. Furthermore the agreement has been nullified by the letter dated 30 August 1989 in which the Selangor State Authority refused to give their consent. The subsequent consent given by the Selangor State Authority on 11 July 1990 cannot revive the agreement which has ceased to exist as from 30 August 1989. Since the issue of the validity of the subsequent consent given by the Selangor State Authority has not been raised in the pleadings of both parties in this civil suit and the applicant too did not raise this issue in his Motion, I shall not deal with this issue. However assuming without deciding that the subsequent consent is valid, the parties would have to enter into a fresh agreement and thereafter they could make use of the said consent to facilitate the completion of the sale and the transfer of the disputed property to the purchaser under the fresh agreement.

As to prayer (2) and (3) of the applicant's motion by which he is asking for loss of rentals and damages for loss of use of the disputed premises and also damages for wrongful caveating of the disputed property by the respondent, I do not think it is proper for me to consider these matters since Counsel for the respective parties have not in their respective submissions directed their minds to these matters. I therefore invite both Counsel to address me regarding these matters. To be fair to the respondent I would also allow her to file in a further affidavit to oppose the applicant's claim for loss of rental and damages if she so wishes since in her claim made in her civil suit and in her defence against the applicant's motion for setting aside the caveat, it is natural for her to direct her mind substantially if not solely to her claim that the agreement was still substituting and the applicant was not entitled to set aside the caveat. Hence she had not at the material time directed her mind to the claim of the applicant for damages.

However that may be I can and shall consider the issue regarding interest payable to the applicant as this issue has been dealt with in the affidavits of the respective parties in this motion and fully argued by Counsel acting for the respective parties. On the evidence I hold that the applicant is not entitled to any interest simply because the issue of the required letter of undertaking was not issued until 17 July 1989 that is after the expiry of 2-month period stipulated in clause 5 well as the 1-month extension allowed under clause 8.

I shall now deal with the application of the plaintiff for summary judgment pursuant to O. 81 of the RHC. From the above discussions on the subject of the defendant's application to set aside the interim order, it is clear that the plaintiff is not entitled to apply for summary judgment under O. 81. The application should be dismissed.

For the reasons as stated above I therefore made the following Orders:

1. The application of Kok Kon Sang pursuant to the originating motion No. 21-39-91 for the setting aside of the caveat registered on 15 January 1990 over the disputed land is allowed with costs.
2. Prayers (2) and (3) of the said originating motion will be heard on a date to be fixed the SAR.
3. The application of the plaintiff for summary judgment pursuant to O. 81 filed by way of summons-in-chambers on 13 August 1991 in the present Civil Suit is dismissed with costs.